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Supreme Court, U.S.
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In The

# Supreme Court of the United States

DOUGLAS V. LANE,

*Petitioner,*

v.

STATE OF PENNSYLVANIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a double jeopardy claim may be raised for the first time on appeal where there has been no "knowing" or "intelligent" waiver below, as the majority of federal courts of appeals and state courts have held, which is contrary to the decision of the Pennsylvania courts in this matter and the courts of several other states.

## LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties – Petitioner Douglas V. Lane, and Respondent State of Pennsylvania.

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DOUGLAS V. LANE respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

## OPINIONS BELOW

The decision of the Superior Court of Pennsylvania, the merits of which are at issue in this petition and which is found at App. 1, was filed on June 26, 2007, and is unreported. The Superior Court denied reargument on August 28, 2007. *See*, App. 19. The Pennsylvania Supreme Court's denial of Petitioner's petition for allowance of appeal of the Superior Court's decision is found at App. 20, is unreported, and was filed on April 9, 2008.

## JURISDICTION

The Supreme Court of Pennsylvania entered its order on April 9, 2008, *see*, App. 20, denying Petitioner's petition for allowance of appeal from the substantive decision of the Superior Court of Pennsylvania. *See*, App. 1. Justice Souter granted an application to extend the time to file this petition until September 6, 2008, a Saturday. This Petition was thus due on the next business day, September 8, 2008. *See*, S.Ct.R. 30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), Petitioner having

asserted below and asserting herein a deprivation of rights secured under the United States Constitution.

## TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

**Amendment V:**

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

**Amendment XIV:**

> . . . nor shall any State deprive any person of life liberty, or property, without due process of law . . .

## STATEMENT OF THE CASE

Petitioner Douglas Lane was charged by criminal information in the Court of Common Pleas of Lackawanna County, Pennsylvania, with numerous counts relating to allegations of improper sexual contact with several adolescent boys. At the close of

Respondent's case in Petitioner's first trial, defense counsel sought judgment of acquittal since no prosecution witness identified Petitioner as the perpetrator of the offenses. *See*, App. 22. The trial court denied this motion, *see* App. 26, but granted Petitioner's unrelated motion for mistrial based on his argument that several of the charges related to activity which allegedly occurred many years past, and were thus barred by the applicable statute of limitations.

Counsel sought to prevent a retrial, alleging that Respondent had engaged in prosecutorial misconduct related to the statute of limitations issue, and invoked the protections of the Fifth Amendment's double jeopardy clause, applicable to the states via the Fourteenth Amendment's due process clause. U.S. Const. amends. V and XIV. With the trial court's denial, a second trial commenced.

What was not raised pretrial, however, was a double jeopardy claim based upon the insufficiency of prosecutorial evidence from the first trial where Petitioner went unidentified. Under Pennsylvania law, this deficiency was fatal to the prosecution's case, *see, e.g., Commonwealth v. Hickman*, 453 Pa. 427, 309 A.2d 564 (1973), but the trial court's rejection during that first trial left appellate review of this issue for another day.

The second jury found Petitioner guilty on most counts, with the trial court imposing a sentence that included an aggregate term of imprisonment of

fourteen years, three months minimum, to thirty years maximum.

With new counsel representing him, Petitioner pursued direct appeal to the Superior Court of Pennsylvania. Among the issues raised at this level was the claim that Respondent's failure to identify Petitioner at his first trial, and thus the insufficiency of evidence against him rendered his conviction and sentence at the second trial violative of his double jeopardy rights. The Superior Court refused to address the merits of this claim. App. 1. Instead, in a footnote, the Court held that the failure to raise this species of double jeopardy at the trial level rendered it "waived." *Id* at fn1.

Petitioner requested reargument in the Superior Court, which was denied. App. 19. With a similar denial of discretionary review by the Pennsylvania Supreme Court, App. 20, Petitioner sought an extension of time from the Hon. David Souter to seek certiorari review, which was granted. *See, Lane v. Pennsylvania*, 08A10 (Application to Extend). This present timely petition follows.

## REASONS FOR GRANTING THE WRIT

### I. The Decision Below Implicates an Irreconcilable and Deepening Conflict Among the Federal and State Courts

1. The present case provides this Court an opportunity to resolve a deepening split among the federal circuits and state courts on an important question of constitutional law, namely whether the fundamental right to be free from twice being placed in jeopardy can be waived without a knowing and voluntary waiver. The specific factual posture of this case represents a particular context in which this question is most acutely confronted by the courts, and in which this judicial split is most aggravated, namely, whether a double jeopardy claim is waived on appeal if not first argued at the trial level. As the Superior Court held in this case, Pennsylvania is one of those jurisdictions which applies strict waiver in the face of such failure. This, however, is becoming an increasingly minority position.

In his article published nearly fifteen years ago, Prof. Gabriel J. Chin analyzed the almost universal position of the federal courts at that time which mirrored the Superior Court's decision in this case, i.e., that a double jeopardy claim raised for the first time on appeal was not properly preserved, and was thus waived. *See*, Gabriel J. Chin, *Double Jeopardy Violations as "Plain Error" Under Federal Rule of Criminal Procedure 52(B),* 21 Pepp. L.Rev. 1161 (1994). Referring to this as the "rule of waiver," the Chin article chided those various circuits for adhering

to what was "doctrinally insupportable," given the broad power of the federal courts under F.R.Crim.P. 52(b) to correct "plain error" which was not objected to at the lower level. *Id.*

In the near decade and a half since, the position of the federal appeals courts is likewise virtually universal on this issue, but in the exact opposite way to that which Prof. Chin found. *See, U.S. v. Miller*, 527 F.3d 54 (3rd Cir. 2008) ("We review Miller's double jeopardy claim for plain error since he did not raise the issue before the District Court."); *see also, U.S. v. Henry*, 519 F.3d 68 (1st Cir. 2008) (same); *U.S. v. White*, 240 F.3d 127 (2nd Cir. 2001) (same); *U.S. v. Jarvis,* 7 F.3d 404 (4th Cir. 1993) (same); *U.S. v. Ogba*, 526 F.3d 214 (5th Cir. 2008) (same); *U.S. v. Wheeler,* 330 F.3d 407 (6th Cir. 2003) (same); *U.S. v. Doyle,* 121 F.3d 1078 (7th Cir. 1997) (same);[1] *U.S. v. Bercier*, 506 F.3d 625 (8th Cir. 2007) (same); *U.S. v. Hernandez-Guardado,* 228 F.3d 1017 (9th Cir. 2000) (same); *U.S. v. Battle*, 289 F.3d 661 (10th Cir. 2002) (same); *U.S. v. Smith,* 532 F.3d 1125 (11th Cir. 2008) (same).[2]

2. The decision of the Pennsylvania Superior Court in this case, consistent with the published

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[1] *But see, Gomez v. Berge*, 434 F.3d 940 (7th Cir. 2006) ("[D]ouble jeopardy rights may be waived by failing to preserve the issue for appeal.")

[2] The U.S Court of Appeals for the D.C. Circuit has apparently not addressed this issue directly.

holding of the Pennsylvania Supreme Court in another case, *see, e.g., Commonwealth v. White*, 476 Pa. 350, 382 A.2d 1205 (1978), is in direct conflict with the decisions of these federal appeals courts, as well as decisions from courts in other states. The landscape of state cases addressing this issue, however, is not as consistent as it is now at the federal level. In fact, the split among state courts on the question of whether a double jeopardy claim is waived if not raised at trial is at least as deep as that between the federal circuits and the Pennsylvania courts in the present case.

For example, some states, like Pennsylvania, adopt an outright "rule of waiver," *see*, Chin, 21 Pepp. L.Rev. at 1163, when double jeopardy is not first raised in the trial court. *See, e.g., Jennings v. State*, 965 S.2d 1112 (Ala. Crim. App. 2006) (double jeopardy issue "must be preserved for appellate review or it is waived."); *see also, People v. Scott*, 83 Cal.App.4th 784, 100 Cal.Rptr.2d 70 (2000) ("A plea of double jeopardy cannot be raised for the first time on appeal."); *Nixon v. U.S.*, 728 A.2d 582 (App. D.C. 1999) (same); *Bruster v. State*, 291 Ga.App. 490, 662 S.E.2d 265 (2008) ("This court will not consider alleged errors, even those of constitutional dimension [i.e., double jeopardy] unless they were raised and ruled upon in the trial court."); *State v. Halliburton*, 539 N.W.2d 339 (Iowa 1995) ("[W]e will not consider [defendant's] claim of double jeopardy for the first time on appeal."); *Taylor v. State*, 381 Md. 602, 851 A.2d 551 (2004) (double jeopardy issue not preserved

for appellate review if not ruled on by trial court); *Commonwealth v. Spear*, 43 Mass.App.Ct. 583, 686 N.E.2d 1037 (1997) (same); *State v. Cote*, 126 N.H. 514, 493 A.2d 1170 (1985) (double jeopardy may not be raised for the first time on appeal); *State v. Applewhite*, 660 S.E.2d 240 (N.C.App. 2008) ("The failure of a defendant to properly raise the issue of double jeopardy before the trial court precludes reliance on the defense on appeal."); *State v. Rice*, 348 S.C. 417, 559 S.E.2d 380 (2001) ("A claim of double jeopardy is not a question of subject matter jurisdiction and thus may not be raised for the first time on appeal."); *Yetter v. State*, 987 P.2d 666 (Wyo. 1999) ("A criminal defendant waives the defense of double jeopardy if she does not present her double jeopardy argument to the trial court.").

3. The majority of states which have directly addressed this issue, however, are more in line with current federal practice, and either permit full appellate review of a non-preserved double jeopardy claim, or apply some version of the federal "plain error" standard in such cases. *See, e.g., Clifton v. State*, 758 P.2d 1279 (Alaska Ct. App. 1988) ("[D]ouble jeopardy issue may be raised for the first time on appeal without prejudice."); *State v. Millanes*, 180 Ariz. 418, 885 P.2d 106 (1994) (without a "knowing, intelligent, and voluntary waiver" at the trial level, a double jeopardy claim is reviewable on appeal); *People v. Cruthers*, 124 P.3d 887 (Colo.App. 2005) ("We review an unpreserved double jeopardy challenge for plain error."); *State v. Stephen O.*, 106 Conn.App. 717, 943

A.2d 477 (2008) (double jeopardy claim raised on appeal not waived where "record is adequate for review and defendant's claim is of constitutional magnitude."); *Valdes v. State*, 970 So.2d 414 (Fla.App. 2007) ("[A] double jeopardy violation constitutes fundamental error [citation omitted] and a claim of fundamental error may be raised for the first time on direct appeal."); *State v. Miyazaki*, 64 Haw. 611, 645 P.2d 1340 (1982) (double jeopardy is a "substantial right" and may be "noticed although [] not brought to the attention of the court."); *State v. Hussain*, 143 Idaho 175, 139 P.3d 777 (Idaho App. 2006) (while rule requires that double jeopardy be raised below, it will be addressed when raised "for the first time on appeal under the principle of fundamental error."); *People v. Henry*, 204 Ill.2d 267, 789 N.E.2d 274 (Ill. 2003) (plain error review of an unpreserved double jeopardy claim); *Wilder v. State*, 813 N.E.2d 788 (Ind.App. 2004) ("[I]t is well settled that a violation of double jeopardy protections is fundamental error and must be addressed upon appeal *sua sponte*."); *State v. Walker*, 283 Kan. 587, 153 P.3d 1257 (Kan. 2007) ("[D]ouble jeopardy [violation raises] a question of law subject to unlimited review."); *Eberenz v. Commonwealth*, ___ S.W.3d ___ (Ky.App. 2008) ("[F]ailure to object to double jeopardy at trial does not waive the right to raise the issue on appeal."); *State v. Austin*, 900 So.2d 867 (La.App. 2005) (double jeopardy may be raised for first time on appeal); *State v. Robinson*, 730 A.2d 684 (Me. 1999) (same); *People v. Scott*, 275 Mich.App. 521, 739 N.W.2d 702 (2007) ("[U]npreserved double jeopardy challenge [is reviewed] for plain

error."); *State v. Johnson*, 245 S.W.3d 288 (Mo. App. 2008) (unpreserved double jeopardy claim reviewed on appeal if violation evident on face of the record); *State v. Weitzel*, 299 Mont. 192, 998 P.2d 1154 (2000) (unpreserved double jeopardy claim reviewable for plain error on appeal); *State v. Allah*, 170 N.J. 269, 787 A.2d 887 (2002) (while an unpreserved double jeopardy claim is waived on appeal, "the court, for good cause shown [such as a claim of ineffective assistance of counsel] may grant relief from the waiver."); *State v. Dombos*, 143 N.M. 668, 180 P.3d 675 (2008) ("[Defendant] may raise a double jeopardy challenge on appeal, regardless of whether the issue was preserved."); *People v. Madden*, 49 A.D.3d 1264, 856 N.Y.S.2d 344 (2008) (double jeopardy claim not required to be preserved for appellate review); *State v. Foust*, 105 Ohio.St.3d 137, 823 N.E.2d 836 (2004) (unpreserved double jeopardy claim subject to plain error review on appeal); *Head v. State*, 146 P.3d 1141 (Okla. Crim. 2006) (same); *State v. Day*, 925 A.2d 962 (R.I. 2007) (unpreserved double jeopardy claim waived unless good cause shown); *State v. Franklin*, 130 S.W.3d 789 (Tenn.App. 2003) (review granted of unpreserved double jeopardy claim "to correct an error of constitutional dimension and to prevent manifest injustice."); *Stephenson v. State*, 255 S.W.3d 652 (Tx. Ct. App. 2008) (double jeopardy claim not waived if violation apparent on "face of the record and where enforcement of usual rules of procedural default serves no legitimate state interests."); *State v. Anderson*, 157 P.3d 809 (Utah Ct. App. 2007) (double jeopardy raised for first time on appeal reviewed for

"plain error."); *State v. Reeves*, 144 Wash.App. 422, 182 P.3d 491 (2008) (double jeopardy "is a constitutional challenge that may be raised for the first time on appeal.").

4. The rift created by these widely varying approaches to the unpreserved double jeopardy argument serves no legitimate constitutional interest but instead leads to a simmering disrespect for this fundamental principle of Fifth Amendment jurisprudence. While the federal courts of appeals have altered their course since Prof. Chin's article was published, 21 Pepp. L.Rev. 1161, and now grant an exacting but important level of review of such double jeopardy claims, as do the majority of states which have addressed this issue head on, there remains a solid and strong minority of states (like Pennsylvania in this case) which are steadfast in their denial of appellate review of these challenges despite their constitutional import. These states leave defendants, who constitutionally should never have been tried and thus possess an absolute right to dismissal under the Fifth Amendment, with little recourse. In light of this troubling and inconsistent interpretation among the courts, it is essential that this petition be granted so resolution of this conflict may commence.

## II. The Question Presented Significantly Impacts the Administration of Criminal Justice, Given the Widely Different Views of Constitutional Waiver Which These Conflicting Decisions Represent

1. The import of this case extends beyond the troubling and vast conflict among the state and federal courts, and attaches to the critical issue of how and when a fundamental constitutional right can be extinguished. As such, its resolution will have a significant impact on the administration of criminal justice given the widely different effects upon double jeopardy appellants in the conflicting jurisdictions.

At its core, the decision of the Superior Court below represents a judicial encroachment on an accused's constitutional liberty without so much as a nod of concurrence from him. As this Court has clearly explained, judicial finding of "waiver" does not merely defer review of a certain claim, it "extinguishes" it altogether. *See, U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. . . . Mere forfeiture, as opposed to waiver, does not extinguish an error. . . . ") (internal citations omitted).

With the evolution of caselaw in this area, the various circuits have recognized the terminal nature of waiver in this context and its impact on such a

right as fundamental as double jeopardy. For example, the 11th Circuit suggests that the *Olano* holding, and its explanation of the critical difference between waiver and forfeiture, may have prompted the circuits to reconsider their position with regard to the more drastic "rule of waiver" decisions in unpreserved double jeopardy cases. *See, U.S. v. Lewis*, 492 F.3d 1219, 1223 (11th Cir. 2007). Accordingly, in *Lewis*, the Court reversed its prior adherence to the "rule of waiver" and employed "plain error" review in the face of an unpreserved claim where the defendant "took no affirmative step to waive his right against double jeopardy." *Id.*[3]

2. The *Lewis* decision, and the above cited cases like it, pay due respect to this Court's ancient principle that wavier of those fundamental constitutional rights which guarantee a fair trial must be "knowing" and "intelligent." *Schnekcloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *see also, Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The decision of the

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[3] While this Court has not directly addressed the issues presented in this case, it has, in dicta, recognized the obvious truism that double jeopardy, like other constitutional rights, can be waived. *See, Peretz v. U.S.*, 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). In so doing, it cites *U.S. v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), which, at the time, supported the then-prevailing federal view that unpreserved double jeopardy claims were "waived" on appeal. *See,* Chin, *supra*. The decision in *Lewis, supra,* however, recognizes the abrogation of *Bascaro,* leaving the reference to it in *Peretz* of little value.

Pennsylvania Superior Court below abrogates this principle, as do the holdings of those courts with similar views. Petitioner "took no affirmative steps to relinquish his right against double jeopardy." *Hernandez-Guardado, supra.* No colloquy was conducted, nor was there even an implied surrender of these rights. Nonetheless, Petitioner's double jeopardy challenge (based on his assertion that the insufficiency of the evidence presented against him at his first trial render his second trial and conviction constitutionally infirm) has never received judicial review. If the Pennsylvania and similar courts are correct, then this Court's doctrine relating to the "knowing" and "intelligent" waiver of constitutional rights has been grossly misunderstood. Since nothing in our jurisprudence suggests this, it is respectfully suggested that those courts which stubbornly hold to their version of the "rule of wavier" principle, and deny review of double jeopardy claims raised first on appeal, are simply in error. Nothing short of review by this Court at this time will suffice in the face of this misguided interpretation of law.

## III. The Present Case Represents a Superb Vehicle for Consideration of the Question Presented

1. The present case presents an excellent opportunity to address the question presented. This is particularly so given that this case arises from a simple, clean record. It is clear from review of the record of the first trial that the prosecution failed to

identify Petitioner as the perpetrator of the offenses for which he was charged. His prior counsel made the appropriate motion which the trial court denied. App. 23-26. After he was convicted at his second trial and sought direct review, he was presented with the opportunity to seek appellate redress of his double jeopardy issue. The Superior Court faced the claim that in light of insufficient evidence at the first trial the second trial was a nullity and thus rendered Petitioner's conviction a violation of his double jeopardy rights, but tersely dismissed it. App. 6, fn. 1.

2. With this dismissal spawning the present petition, the question presented is uncluttered with ancillary matters of record and is available for this Court's review and rectification. Petitioner has the right to have his double jeopardy claim heard, and had he been convicted in federal court or one of the majority of states with similar understanding of the law, he would have the opportunity to argue this "unwaived" constitutional claim. By finding waiver, despite a lack of any affirmative, specific steps on Petitioner's part, or *any* act which could be construed as a "knowing" or "intentional" relinquishment of his double jeopardy rights, the Superior Court of Pennsylvania has now declared those rights "extinguished." *See, Olano, supra.* That Court's decision is simple, and it is either right or wrong, but it stands in such stark contrast to the majority of other courts which have examined similar claims that it provides a ripe opportunity for this Court to declare which side's reasoning is best. Missing this opportunity is to

risk abandonment of a vital constitutional issue to an unsupported legal premise represented in the Superior Court's holding (and in the decisions of like cases). Such a precious and principled liberty as the freedom to be spared twice being placed in jeopardy is imperiled by such a rule. This condition cannot be allowed to endure, and the present case is the vehicle by which its end can be effectuated. Grant of the present petition is imperative.

## CONCLUSION

For the foregoing reasons, Petitioner Douglas V. Lane prays that this Court grant his petition for writ of certiorari.

Respectfully submitted,

JOSEPH M. COSGROVE
*Counsel of Record*
*Attorney for Petitioner*

Non-Precedential Decision

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Appellee | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | No. 594 MDA 2006 |
| DOUGLAS V. LANE, Appellant | : | |

Appeal from the Judgment of Sentence entered October 4, 2005, in the Court of Common Pleas of Lackawanna County, Criminal Division at Nos. CP-35-CR-0001901-2004 and CP-35-CR-0001902-2004

BEFORE: BENDER, BOWES AND COLVILLE*, JJ.

MEMORANDUM: FILED: June 26, 2007

This case is a direct appeal from judgment of sentence. Appellant raises numerous issues, all of which are without merit and/or have been waived. Accordingly, we affirm.

*I*

A no-adverse-inference instruction explains to the jury that a defendant has a constitutional right to remain silent and that the jury can draw no adverse inference from the decision not to testify. ***See Commonwealth v. Garcia,*** 888 A.2d 633, 634 n.1 (Pa. 2005). In this case, the trial court did not give such an instruction. The court did, however, charge the jury

that a person accused of a crime is not required to present evidence.

Appellant claims that he advised the court of its failure to give the required charge. Specifically, he points to the following exchange that occurred after the jury instructions:

> THE COURT: Any exceptions?
>
> MR. WALKER (APPELLANT'S COUNSEL): Judge, I'm sure you probably didn't, but did you indicate there's no evidence if he doesn't testify? I thought you were going to cover a reasonable doubt, presumption of innocence.
>
> THE COURT: I said that he doesn't have to present any evidence whatsoever.
>
> MR. WALKER: Okay.

N.T., 3/30/05, 208.

We recognize that Appellant's counsel initially questioned whether the court gave the required charge, but he stated, "[O]kay," when the court responded to his question. Based on the aforementioned exchange, it is apparent the court believed its instruction was sufficient to satisfy the no-adverse-inference requirement, and Appellant's counsel, even if initially objecting, nonetheless acquiesced to the court's explanation. Having failed to preserve his objection to the charge, Appellant may not pursue this issue on appeal. ***See*** Pa.R.Crim.P. 647(B).

## *II*

Appellant also complains that the trial court's instruction regarding involuntary deviate sexual intercourse included a misstatement of the testimony and added details not alleged in the criminal information. Appellant has an obligation to demonstrate to this Court when and how issues were preserved. Pa.R.A.P. 2117(c); 2119(e). Appellant points to no place in the proceedings at which he preserved the aforementioned claims, and we have found no such place. Thus, Appellant has waived these contentions.

## *III*

Appellant next raises a double jeopardy claim. The Commonwealth originally charged Appellant with assaulting two victims over a number of different years. There were multiple criminal informations and a substantial number of counts involving various offenses. Appellant filed a pretrial motion alleging that certain charges were barred by the statute of limitations. The court denied Appellant's motion and he proceeded to trial on all charges.

At some point during the trial, the court became concerned that some of the charges were indeed time-barred and instructed the Commonwealth to review the issue. The Commonwealth then determined that the statute of limitations barred certain charges involving one of the victims. Because the jury had heard evidence involving both victims, the court decided to Grant a mistrial as to all charges.

Appellant filed a motion to bar his retrial. He essentially alleged that the prosecution had engaged in misconduct by proceeding with charges when the Commonwealth knew the charges were time-barred. The court held an evidentiary hearing on this matter and subsequently denied relief. Appellant again proceeded to trial, was convicted and subsequently filed this appeal.

The prohibition against double jeopardy bars retrial where prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial and/or where the misconduct is intentionally undertaken to prejudice the defendant to the point of a denial of a fair trial. ***Commonwealth v. Chmiel,*** 777 A.2d 459, 464 (Pa. Super. 2001). It is important to recognize that not all prosecutorial misconduct precludes a retrial. ***Id.*** Rather, the misconduct must be so egregious as to involve the aforementioned intentional unfairness. ***Id.*** Therefore, to determine whether misconduct was sufficient to prevent a retrial, this Court must analyze the particulars of the prosecutor's behavior. ***Id.*** at 464-66.

It is an appellant's obligation to persuade us that there were trial court errors and that relief is due because of those errors. ***Commonwealth v. Love,*** 896 A.2d 1276, 1287 (Pa. Super. 2006). To do so, he must develop arguments, setting forth relevant law with citations, and explaining how that relevant law applies to the actual facts of the case. ***See Commonwealth v. Irby,*** 700 A.2d 463, 464 (Pa. Super. 1997). Factual discussions must include citations to the

place in the record where those facts appear. Pa.R.A.P. 2119(c). Failure to present developed arguments in the aforesaid manner results in waiver of claims. ***Irby,*** 700 A.2d at 464.

Based on the foregoing legal principles, Appellant must, in this case, articulate an argument applying the pertinent double-jeopardy law to the prosecutor's conduct so that we may evaluate the challenged behavior and determine if it was either intended to goad Appellant into asking for a mistrial or designed to cause an unfair trial.

Considerations involving the statutes of limitations in the first trial were, from the outset, complex. The multiple offenses arose at different times and had varying periods of limitations. Additionally, because the sex crimes involved minor victims, there was an issue as to whether an exception to the limitations periods might apply to some or all of the charges. ***See*** 42 Pa.C.S.A. § 5552(c)(3) (tolling the statute for some crimes until the victim's eighteenth birthday). Accordingly, an accurate determination of the applicable statutes required a consideration of each of the pertinent criminal statutes, the date of each offense, the length of the limitations period for each crime, the victims' ages at the time of each offense, the date of each victim's eighteenth birthday, and the statutory provision relating to tolling. On appeal, this Court must consider what the Commonwealth knew on every one of these points and when the Commonwealth knew it.

Appellant's brief sets forth case law relevant to double jeopardy. However, he does not discuss or cite to the particular facts of this case. He does not identify which periods of limitations applied to which charges and does not present us with relevant dates. Consequently, we cannot determine how clear or unclear it may have been that the limitations periods had run on particular charges. Such a determination is essential in evaluating the Commonwealth's behavior.

Appellant offers no insight into the testimony offered at the fact hearing relevant to his double jeopardy motion. We do not know what the Commonwealth knew when. In short, Appellant does not apply the statutes and case law to the facts of his case. Thus, we cannot evaluate whether the Commonwealth acted egregiously, intending to make the first trial unfair, or whether the Commonwealth merely made honest mistakes. We will not develop Appellant's argument for him. ***Commonwealth v. Hardy,*** 918 A.2d 766, 771 (Pa. Super. 2007). This issue is waived.[1]

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[1] Appellant also contends that the first trial court improperly denied his motion for judgment of acquittal based on insufficient evidence, but, because that court granted a mistrial based on the problems with the statute of limitations, Appellant could not appeal the trial court's ruling on sufficiency. He then argues that he is entitled to pursue his sufficiency claim as part of a double jeopardy argument on this appeal. He points to no place in the record where he preserved [sic] raised this double

(Continued on following page)

## *IV*

Appellant argues that the trial court erred by admitting evidence of prior bad acts pursuant to Pa.R.E. 404(B). Decisions regarding the admission of evidence rest within the trial court's discretion. ***Commonwealth v. O'Brien,*** 836 A.2d 966, 968 (Pa. Super. 2003). This Court may disturb such a decision only if there was an abuse of that discretion, not merely because we disagree with the trial court's ruling. ***Id.***

Evidence of prior bad acts is not admissible to prove action in conformity therewith. Pa.R.E. 404(b)(1). However, such evidence may be admissible for other purposes, including proof of a common plan, scheme or design embracing the commission of multiple crimes so related to each other that proof of one tends to prove the other. ***O'Brien,*** 836 A.2d at 969. A court must consider the details of the various bad acts to decide if they are sufficiently similar to qualify for admission under the common-plan exception to the general exclusion of prior-bad-acts evidence. ***Id.*** Also, even when offered for an acceptable purpose, prior-bad-acts evidence is admissible only upon a showing that its probative value outweighs its potential prejudice. Pa.R.E. 404(b)(4).

In this case, Appellant was accused of committing sex crimes against Victim, then a teenager. The

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jeopardy theory and we have found none. This contention has been waived.

record supports the trial court's findings that Appellant had contact with Victim's parents and that he allowed Victim to perform some type of work at his (Appellant's) home and radio station. Victim also went on over-night trips with Appellant, working on Appellant's balloon crew and sharing a room with other boys and Appellant. Appellant provided alcohol to the boys who went on such trips. During such trips, Appellant engaged in oral and anal sex with Victim.

The trial court permitted the introduction of Appellant's past sexual interaction with five other teenage boys. While the evidence concerning each act was not identical, there were substantial similarities. The boys ranged in ages from roughly twelve to fifteen. They performed work at Appellant's home and/or radio station, and/or in connection with his apparent pastime of hot-air ballooning. With respect to at least four of the minors, Appellant had contact with their parents. Also, at least four of the five minors drank alcohol at Appellant's home and/or in his presence. In all five cases, Appellant had oral sex with the minors. Appellant had anal sex with at least one of them. The events involving the five boys took place at various times from the 1960s through the late 1980s or early 1990s.

The trial court found that the evidence concerning the prior bad acts showed a common plan, scheme or design justifying its admission into evidence. Appellant attempts to distinguish his case facts, arguing, for example, that Victim was fifteen while some of the other boys were not that age. He also

contends that the events in this case took place during ballooning trips while the others generally centered on work at Appellant's home or radio station. Additionally, Appellant notes that most of the prior acts evidence arose in the 1960s, 1970s and 1980s, while this case involved events in the 1990s.

Appellant's attempts to distinguish his case from the prior events do not show an abuse of discretion by the trial court. The minors' ages were quite similar. Appellant established relationships of comfort or confidence with his victims by exploiting his position as a radio personality or his work as a balloonist. Alcohol use by the minors while in Appellant's presence was common to most albeit not all of the evidence. Finally, Appellant manipulated his victims to engage in oral and, at times, other types of sexual activity.

It is true that some of the prior sexual activity took place decades in the past. However, viewed as a whole, the evidence shows a common plan of sexual crimes against minor boys continuing over some forty years.

In light of the foregoing facts, the trial court decided that the prior acts were sufficiently similar to the present case that proof of them tended to prove a common plan, scheme or design.

Undoubtedly, admission of the evidence was prejudicial to Appellant. However, the trial court found that the probative value of this evidence outweighed the potential for prejudice. Based on the

record, we cannot say that the court's decision to admit this evidence was an abuse of discretion – that is, that it involved partiality, prejudice, bias, ill-will or manifest unreasonableness. Appellant's claim fails.

*V*

Appellant argues the sentencing court's determination that he is a sexually violent predator (SVP) must be reversed for several reasons. First, he asserts that provisions of or relating to Megan's Law II, specifically 42 Pa.C.S.A. § 9795.2 and 18 Pa.C.S.A. § 4915, violate the due process guarantees of the federal and state constitutions by making him subject to an SVP status pursuant to an evidentiary standard of clear and convincing evidence rather than proof beyond a reasonable doubt.

This claim lacks merit. As a standard of proof for the determination of SVP status, clear and convincing evidence is consistent with constitutional due process. ***Commonwealth v. Maldonado,*** 838 A.2d 710, 718 (Pa. 2003).

Appellant also contends that there was insufficient evidence to classify him as an SVP. Specifically, he argues that the Commonwealth's expert did not testify that Appellant is likely to engage in the future in predatory sexually violent offenses. The likelihood of engaging in such behavior is an element of SVP

status that the Commonwealth must prove under 42 Pa.C.S.A. § 9792.[2]

This Court will reverse a determination of SVP status only if the Commonwealth did not present proof sufficient to establish the challenged element(s) by clear and convincing evidence. ***Commonwealth v. Hitner***, 910 A.2d 721, 729 (Pa. Super. 2006). In the course of reaching our decision, we view the evidence and its reasonable inferences in the light most favorable to the Commonwealth. ***Id.***

Testimony from the Commonwealth's expert included the following:

> [Appellant's] age statistically and theoretically should have made him a reduced risk for criminal offending. However, that risk would have been reduced at a much earlier age, around in his 40s if it were to decrease. He continued to offend suggesting statistically he does not meet the trend that somebody would meet to not reoffend, **so he is in that portion of people who continue to**

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[2] 42 Pa.C.S.A. §§ 9792 defines a sexually violent predator as a person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

**reoffend into their later ages and is probably not likely to stop.**

N.T., 10/04/05, at 28, 29 (emphasis added).

Reading this testimony in the light most favorable to the Commonwealth, we find that the expert did, contrary to Appellant's contention, offer an opinion indicating that Appellant is likely to engage in predatory behavior in the future. During the hearing, the expert also testified that Appellant suffers from a mental abnormality known as paraphilia not otherwise specified. In Appellant's case, this abnormality is a chronic and persistent sexual arousal involving adolescent males that has motivates him to victimize minors.

The grounds for the expert's opinion included the child pornography Appellant was found to possess which reflected sexual conduct between adolescent males. Other supporting facts included Appellant's behavior in promoting relationships with Victim and other minors by presenting himself as a kind and giving person, having them accompany him on overnight trips, allowing them to work on his hot air balloons or at his radio station, and exposing them to alcohol. The expert explained that offering an adolescent victim such opportunities builds a bond between victim and assailant, reduces the victim's resistance to an assault and diminishes the chance of reporting by the victim. Indeed, she opined that Appellant's activities were specifically related to promoting and

maintaining a relationship for the purpose of victimization. We note that such conduct fits the definition of "predatory" set forth in 42 Pa.C.S.A. § 9792.

The foregoing evaluation by the expert embraces considerations of the relationship between Appellant and Victim, Appellant's age, Victim's age, Appellant's mental abnormality, and his overall behavior contributing to the sexual contact with Victim. These factors are all items appropriately considered when making an assessment relative to SVP status. ***See*** 42 Pa.C.S.A. § 9795.4(b)(1).

In sum, the expert testified to sufficient facts and offered a sufficient opinion to support the SVP designation. Appellant's claim fails.

Additionally, Appellant contends that the sentencing court abused its discretion by considering testimony from the Commonwealth's expert when her opinion was not based on facts of record and/or was based on prior-bad-acts evidence.

With respect to the prior-bad-acts evidence, Appellant incorporates his contentions which we have already found to lack merit. Regarding his contention that the expert relied on facts not of record, Appellant does not discuss those facts. Instead, he makes a blanket reference to the expert's report which report lists various documents upon which the expert relied. We find this argument to be undeveloped and, therefore, waived.

Even if this contention were not waived, it would warrant no relief. Appellant's argument seems merely to be that statements in the documents are hearsay and, therefore, the expert should not have been allowed to rely on them. An expert opinion may properly be based on facts otherwise not admissible in evidence if those facts are of the type reasonably relied upon by experts in the relevant field in forming opinions. Pa.R.E. 703. Appellant has not demonstrated that any of the facts or documents forming the basis of the expert's opinion violated Rule 703.

***VI***

In his next issue, Appellant seeks allowance of appeal to challenge the discretionary aspects of his sentence. To secure such an appeal, an appellant must include in his brief a concise statement of reasons relied upon for allowance of appeal. Pa.R.A.P. 2119(f). The statement must raise a substantial question that the sentencing court's actions were inconsistent with a specific provision of the sentencing code or were contrary to the fundamental norms of the sentencing process. ***Commonwealth v. Malovich,*** 903 A.2d 1247, 1252 (Pa. Super. 2006). When evaluating a request for appeal, this Court will not include or exclude an entire class of questions as necessarily being or not being substantial. ***Id.*** Instead, we look at the particular facts of each case. ***Id.***

It is the appellant's job to articulate in the concise statement how the court's actions violated the

sentencing code. ***Id.*** Indeed, we will not merely accept bald assertions of sentencing errors. ***Id.*** Simply using general phrases (*e.g.*, manifestly excessive) without supporting facts renders a concise statement inadequate. ***Commonwealth v. Hornaman,*** 2007 PA Super 82, 7. Rather, the statement must present a plausible argument, in the factual context of the case, that the sentence contravenes an identified provision or norm of our sentencing law. ***Commonwealth v. Hartle,*** 894 A.2d 800, 805 (Pa. Super. 2006).

If a concise statement appears to raise a substantial question regarding the propriety of a sentence, this Court has discretion to grant allowance of appeal. 42 Pa.C.S.A. § 9781(b). If we do grant an appeal, we will not disturb a sentence absent a manifest abuse of discretion. ***Malovich,*** 903 A.2d at 1252, 1253. An abuse of discretion is not just an error of judgment. ***Id.*** at 1253. Rather, it involves manifest unreasonableness, partiality, prejudice, bias or ill-will. ***Id.***

Appellant's brief contains a concise statement of reasons relied upon for allowance of appeal. The statement contends that Appellant's aggregate sentence (composed of consecutive terms) was too severe to the point of being manifestly excessive. As part of his claim, Appellant asserts that the court did not state sufficient reasons for the sentence and that it stated reasons that were impermissible because they were inconsistent with "statutory provisions and the fundamental norms governing sentencing." Appellant's Brief at 36. He also alleges that the court did

not consider the least restrictive sentence consistent with the rehabilitative needs of Appellant and the safety of the public.

A claim that a sentence is too severe to the point of being manifestly excessive can raise a substantial question regarding the propriety of a sentence. ***Commonwealth v. Mouzon,*** 812 A.2d 617, 624, 625 (Pa. 2002). Likewise, a court's failure to support a sentence by stating sufficient reasons on the record may or may or not deserve an appeal. ***See Commonwealth v. Wilson,*** 2007 PA Super 105, 2 n.4. Similarly, a contention that a court relied on an impermissible factor in sentencing may call for appellate review. ***Commonwealth v. Matroni,*** 2007 PA Super 110, 32. Lastly, claims that a sentencing court failed to consider an appellant's rehabilitative needs and/or that a sentence is inconsistent with the safety of the public may cause this Court to grant allowance of appeal. 42 Pa.C.S.A. § 9721(b). However, with respect to each of these claims, a general assertion thereof will not warrant appellate review unless an appellant identifies facts of his case supporting the claims. ***See Mouzon,*** 812 A.2d at 624-26; ***Matroni,*** 2007 PA Super 110, 32.

The only relevant fact appearing in Appellant's concise statement is the length of his sentence. He does not relate his claim of excessiveness and severity to the circumstances of his case. Appellant gives no indication as to what factors the court did recite at sentencing and/or how those factors were insufficient. He does not identify, in his concise statement, the

impermissible factors upon which the sentencing court relied.

The concise statement suggests that the sentence did not take into account Appellant's rehabilitative needs but it makes no mention whatsoever of what those needs are. The statement does not illuminate the claim that the sentence is somehow inconsistent with considerations of public safety.

We observe, too, that Appellant cites no case law in his concise statement. While claiming that the sentence was inconsistent with "statutory provisions and the fundamental norms of sentencing," he does not cite any statutory provision or articulate the offended norm. Appellant's Brief at 36.

The concise statement does not persuade us that we should grant appeal to consider the sentence in this matter. Accordingly, Appellant's request for allowance of appeal is denied.

Moreover, it is clear that, even if we had granted allowance of appeal, Appellant would be entitled to no relief. The argument section of his brief offers little more in the way of sentencing facts than did his concise statement. For example, the argument portion simply does not explain what particular facts of this case demonstrate why Appellant's sentence is too severe and manifestly excessive. Also, the argument does not even discuss what Appellant's particular rehabilitative needs are.

The argument (unlike the concise statement) does complain specifically that the court relied on retribution as a sentencing factor and contends that retribution is an impermissible consideration. Contrary to Appellant's claim, however, retribution is a valid consideration in this Commonwealth. ***Commonwealth v. Edwards,*** 906 A.2d 1225, 1230 (Pa. Super. 2006); 204 Pa. Code § 303.11(a).

Ultimately, we simply see nothing in the record persuading us that the sentence was manifestly unreasonable or that it resulted from partiality, prejudice, bias or ill-will. Accordingly, there would be no basis to vacate the sentence even if we allowed an appeal.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Bowes concurs in the result.

Judgment Entered:

/s/ James D. McCullough
Deputy Prothonotary

Date: _____

J. A02043/07

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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| v. | : | |
| DOUGLAS V. LANE, | : | |
| APPELLANT | : | No. 594 MDA 2006 |

**ORDER OF COURT**

The Court hereby DENIES the application filed July 10, 2007, requesting reargument or reconsideration of the decision dated June 26, 2007.

PER CURIAM

DATE: August 28, 2007

**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, | : | No. 813 MAL 2007 |
| Respondent | : | Petition for Allowance of Appeal from the Order of the Superior Court |
| v. | : | |
| DOUGLAS V. LANE, | : | |
| Petitioner | : | |

**ORDER**

**PER CURIAM**

**AND NOW**, this 9th day of April, 2008, the Petition for Allowance of Appeal is **DENIED**.

COURT OF COMMON PLEAS
LACKAWANNA COUNTY

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | x | |
| -vs- | x | No. 04-CR-1900<br>04-CR-1901 |
| DOUGLAS V. LANE<br>04-CR-1902 | x | |

TRANSCRIPT OF PROCEEDINGS
OF JURY TRIAL

BEFORE: HONORABLE MICHAEL J. BARRASSE

DATE: March 3, 2005

PLACE: Courtroom No. 3
Lackawanna County Courthouse
Scranton, Pennsylvania 18503

APPEARANCES

For the Commonwealth: EUGENE TALERICO, ESQUIRE
MICHELLE OLSHEFSKI, ESQUIRE

For the Defendant: JAMES J. WALKER, ESQUIRE

* * *

[49] do you have, sir?

MR. WALKER: Assuming that the testimony and the record is closed and the Commonwealth has, indeed, rested, not only did the Commonwealth not show that element, that age of the defendant, the victims in this case, Koelsch and Saxton when he was a victim, nobody identified him at all.

MR. TALERICO: I think they did. I think they did several times.

MR. WALKER: No one – no one identified him –

MR. TALERICO: I believe they did several times.

MR. WALKER: – as being the person they referred to as doing this to them. No one pointed him out. There was no type of either formal or informal identification of my client.

MR. TALERICO: I believe they did several times, Your Honor, inferentially and in court.

THE COURT: Anybody directly?

MR. TALERICO: At this point, Your Honor, I can't remember if they did directly. But I think inferentially every single [50] witness did. Every single witness looked at Mr. Lane every time they testified and said, he said, he told me, he told me this, I think at various times.

Again, Your Honor, these are things that are – certainly can be given to the jury in terms of circumstantial evidence and so forth.

MR. WALKER: These are –I'm sorry. If you finished?

MR. TALERICO: I am.

MR. WALKER: These are not things that can survive the demur to the evidence. If it hadn't been presented, then it doesn't go to the jury. So we can't consider what the jury would or would not find. None – none of these witnesses even outside of Saxton and Koelsch identified Mr. Lane in this case.

THE COURT: Anything else?

MR. TALERICO: No, Your Honor.

MR. WALKER: Outside of the general demur that I already lodged, Your Honor.

THE COURT: The specific two at this point are in regard to the I. D. S. I. counts one and two and general demur and the identification [51] of the defendant, correct?

MR. WALKER: Correct, if you didn't include it, the sexual abuse of children whether or not constitutes the definitional aspect of the charge.

THE COURT: The Court ruled on that. At this time, then we will take a – we will give you until quarter of in regard to those issues.

MR. TALERICO: Thank you, Your Honor.

MR. WALKER: May I approach one moment?

THE COURT: Yes.

(A discussion was held off the record at sidebar.)

(A brief recess was taken at this time.)

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COURT OF COMMON PLEAS

LACKAWANNA COUNTY

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | x | NO. 04-CR-1900 |
| | x | NO. 04-CR-1901 |
| -vs- | x | NO. 04-CR-1902 |
| DOUGLAS V. LANE | x | |

TRANSCRIPT OF PROCEEDINGS
OF JURY TRIAL

BEFORE: HONORABLE MICHAEL BARRASSE

DATE: March 3, 2005

PLACE: Courtroom No. 3
Lackawanna County Courthouse
Scranton, Pennsylvania 18503

APPEARANCES

For the Commonwealth: GENE TALERICO, ESQUIRE
MICHELLE OLSHEFSKI, ESQUIRE
Assistant District Attorneys

For the Defendant: JAMES WALKER, ESQUIRE

Lisa M. Graff, RMR
Official Court Reporter

* * *

[3] THE COURT: At this time based upon arguments of counsel, the Court finds that in regard to the four-year, in regard to the NDSI, in regard to the defendant's alleging four years or more than that of the victims in the case, that the testimony of Dan Pregnar establishing a 30-year relationship, and based upon circumstantial evidence, that that in fact will prove to be at least on excess of the four years while not necessarily establishing the exact age of the defendant at the time.

The other motions of the general demur is denied, and so is that in regard to the identity, and at this time we will bring in the jury. Is there any further motions that need to be reviewed?

MR. TALERICO: No, Your Honor.

MR. WALKER: Not at this time, Your Honor. Your Honor, just I would renew the motion for a mistrial, which I made in several motions individually and collectively for the record.

THE COURT: Okay. Thank you.

(WHEREUPON, jury entered the courtroom.)

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